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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 46

JAMES J. OESTEREICH, PETITIONER

v.

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 11, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (A. 20) is reported at 390 F. 2d 100. The opinion of the district court (A. 13–18) is reported at 280 F. Supp. 78.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1968 (A. 19). The petition for a writ of certiorari was filed on March 19, 1968, and was granted on May 20, 1968 (391 U.S. 912). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner, a student preparing for the ministry, was reclassified as a delinquent and ordered to report for induction into the Armed Forces, because of his failure to keep his registration certificate in his possession and his failure to keep his local draft board informed of his current status. He brought the instant suit to enjoin his induction. The questions presented are:

1. Whether the language of amended Section 10(b)(3) of the Military Selective Service Act, considered alone, bars judicial review of petitioner's Selective Service classification prior to his induction, and, if so, whether the statute is constitutional.

2. Assuming that pre-induction judicial review must be made available where First Amendment claims are asserted, whether petitioner's claims—that the delinquency regulations are impermissibly vague, and that non-possession of registration certificates may not be prohibited where intended as a form of "symbolic speech"—are substantial.

3. Whether petitioner's delinquency reclassification, pursuant to Selective Service regulations, was authorized by the Act, and, if so, is consistent with the Constitution.

4. Whether petitioner's challenges to the procedures followed by his local board may be raised in a pre-induction suit, and, if so, whether these challenges are meritorious.

5. Whether petitioner's status as a ministerial student exempted by statute from military training and service renders the jurisdictional bar of Section 10

(b)(3) inapplicable so as not to prevent a district court from entertaining his pre-induction suit.

STATUTES AND REGULATIONS INVOLVED

Section 10(b)(3) of the Military Selective Service Act of 1967, amending 50 U.S.C. App. 460(b)(3), Public Law 90–40, 81 Stat. 100 *et seq.*, provides as follows:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

Section 6(g) of the Selective Service Act, 50 U.S.C. App. 456(g), provides as follows:

> Regular or duly ordained ministers of religion, as defined in this title, and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been preenrolled shall

be exempt from training and service (but not from registration) under this title.

Section 1617.1 of the Selective Service System regulations (32 C.F.R. 1617.1) provides:

> EFFECT OF FAILURE TO HAVE UNALTERED REGISTRATION CERTIFICATE IN PERSONAL POSSESSION.
>
> Every person required to present himself for and submit to registration must, after he has registered, have in his personal possession at all times his Registration Certificate (SSS Form No. 2) prepared by his local board which has not been altered and on which no notation duly and validly inscribed thereon has been changed in any manner after its preparation by the local board. The failure of any person to have his Registration Certificate (SSS Form No. 2) in his personal possession shall be prima facie evidence of his failure to register. * * *

Section 1642.4(a) of the Selective Service System regulations (32 C.F.R. 1642.4(a)) provides:

> DECLARATION OF DELINQUENCY STATUS AND REMOVAL THEREFROM.
>
> (a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.

STATEMENT

Regulations of the Selective Service System authorize local boards to reclassify as a delinquent any reg-

istrant who "has failed to perform any duty or duties required of him under the selective service law * * *" (32 C.F.R. 1642.4(a)),[1] and require that such a delinquent be given the highest priority for induction into the Armed Forces (32 C.F.R. 1631.7(a)(1)). Pertinent regulations also require registrants to have their registration certificates in their personal possession at all times (32 C.F.R. 1617.1), and to keep their local boards currently informed of their occupational, marital, family, dependency and military status (32 C.F.R. 1641.7).

On October 20, 1967, petitioner's registration certificate was turned in, along with others, to the Department of Justice in protest against the government's involvement in Vietnam (A. 3, 7). His local board, on November 7, 1967, declared him a delinquent on two grounds: (1) "failure to have in his possession a duly authorized registration certificate (SSS Form 2)," and (2) "failure to provide the local board [with notice] of his current status" (A. 4).[2] On the same day, petitioner, who previously had a IV–D classification as a ministerial student, was reclassified as I-A (*ibid.*). After an unsuccessful administrative appeal, he was ordered, by a notice dated December 27, 1967, to report for induction into the Armed Forces on January 24, 1968 (*ibid.*).

Petitioner then filed an action in the District Court for the District of Wyoming, where his local board

[1] "Selective service law" is defined to include regulations issued under the Military Selective Service Act (32 C.F.R. 1602.10).

[2] It should be noted that the record, which consists solely of petitioner's complaint, does not show the factual basis of this alternative ground (see note 26, *infra*).

is located, to restrain his induction. After considering the pleadings and conducting a hearing, the district court dismissed the complaint, relying upon the prohibition of pre-induction judicial review of Selective Service classifications contained in Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. 460(b)(3), as amended, 81 Stat. 104), and petitioner's apparent failure to comply with the $10,000 jurisdictional amount required by 28 U.S.C. 1331 (A. 13–18). The Tenth Circuit affirmed, "for the reasons set forth in the memorandum decision of the trial court and particularly in view of the jurisdictional restrictions contained in 50 App. U.S.C. § 460 (b)3" (A. 20). Petitioner's induction has been stayed pending final disposition of the instant case by this Court.

SUMMARY OF ARGUMENT

Section 10(b)(3), as amended in 1967 by Public Law 90–40, proscribes any "judicial review * * * of the classification or processing of any registrant" by the Selective Service System, "except as a defense to a criminal prosecution * * * after the registrant has responded either affirmatively or negatively to an order to report for induction * * *." That statutory provision is a proper exercise of the congressional power to raise and support Armed Forces (U.S. Const., Art. I, Sec. 8) and to prescribe the scope of the jurisdiction of the lower federal courts (U.S. Const., Art. III, Sec. 1). It precludes judicial review in the instant case insofar as petitioner seeks to have his induction enjoined on constitutional grounds. How-

ever, because of its particular facts, this case raises the additional problem of whether Section 10(b)(3) is applicable where a draft board has utilized the delinquency regulations to cause the reclassification and order the induction of a ministerial student expressly exempted from military training and service under another section of the Act—Section 6(g). On that latter question, the Solicitor General and the Selective Service System take different positions, and the views of both are set forth for the Court's consideration (*infra*, pp. 58–73).

I. Section 10(b)(3) in terms bars judicial review of any Selective Service classification prior to induction. What the section essentially seeks to do is to postpone, not to deny, judicial review of Selective Service System actions and orders. Under the statute, a registrant, in order to obtain judicial review, must either refuse induction and risk criminal prosecution, or submit to induction and seek a writ of habeas corpus. Although this scheme subjects a registrant to some risk and hardship before being permitted to challenge his classification and induction in the courts, Congress made the considered judgment that the need for postponing judicial review in Selective Service cases outweighs such countervailing considerations. As the legislative history shows, the basic congressional purpose was to prevent the "litigious interruption" of the operation of the classification and induction process which would result from the availability of pre-induction judicial review.

If the courts were to entertain suits challenging classifications prior to induction, it would frequently

be necessary to issue preliminary injunctions to prevent induction from mooting such suits before a final decision could be rendered. Many registrants would be likely to sue in order to obtain the delays occasioned by such interim relief. Registrants thus could utilize the courts to postpone their induction, thereby requiring others to take their places in the draft quotas. By delaying judicial review until after induction, the national interest in the effective functioning of the Selective Service System is preserved, while individual rights can nonetheless be vindicated through post-induction review.

The presence of a First Amendment claim in this case does not make the application of Section 10(b)(3) unconstitutional. Petitioner argues that the burdens involved in obtaining judicial review in the manner contemplated by the statute would result in a "chilling effect" on First Amendment rights, relying on *Dombrowski* v. *Pfister*, 380 U.S. 479, 487-489. But the circumstances which led this Court in *Dombrowski* to hold that an injunctive action to prohibit a pending criminal prosecution was available to vindicate First Amendment rights are not presented here. Unlike the situation in *Dombrowski*, registrants subject to induction orders are assured of a "prompt judicial resolution of First Amendment claims" (380 U.S. at 489) pursuant to the ordinary means of judicial review. Moreover, at least here and in similar cases, the registrant's challenge to his induction presents narrow, well-defined legal questions which, unlike those in *Dombrowski*, would not require a "series of * * * criminal prosecutions" to resolve (*ibid.*). In

Cameron v. *Johnson*, 390 U.S. 611, 618–619, this Court recently held *Dombrowski* inapplicable where no showing of "special circumstances" (380 U.S. at 484) had been made, noting that there, in contrast to *Dombrowski*, the prosecutions sought to be enjoined were "for violation of a statute narrowly regulating conduct which is intertwined with expression * * *" (390 U.S. at 618).

II. Petitioner's failure to comply with the possession requirement made him a delinquent and subject to reclassification. The pertinent regulation does not make prima facie evidence of failure to register the sole consequence of non-possession. The first sentence of the regulation states that each registrant must have his registration certificate "in his personal possession at all times." The deletion in 1942 of language in the regulation creating an explicit duty to do so did not change a registrant's basic obligation. Many Selective Service regulations recognized as imposing duties on registrants do not explicitly state that failure to comply therewith constitutes a violation.

III. The requirement that registrants keep their regisration certificates in their possession at all times is a valid regulation incident to the proper functioning of the Selective Service System; the claim that surrender of the certificate is protected by the First Amendment as a form of "symbolic speech" is no more valid than the similar claim, recently rejected by this Court, that destruction of a registration certificate is protected by the First Amendment. *United States* v. *O'Brien*, 391 U.S. 367.

Contrary to petitioner's contention, the delinquency regulations are not so vague as to abridge First

Amendment rights. Those regulations simply incorporate the duties imposed on registrants by the Selective Service Act and regulations, none of which petitioner has shown to be impermissibly vague or overbroad. The requirements involved here—carrying a registration certificate and keeping the local board informed of one's status—are specific and narrow.

IV. Petitioner attacks his reclassification as a delinquent on the ground that it constitutes the imposition of punishment without the procedural protections required for criminal prosecutions. Induction into the Armed Forces, however, is not a penalty. While military service undoubtedly involves certain hardship and restraint, it also represents a duty commonly owed by all citizens, and in no way involves the stigma which ordinarily attaches to criminal punishment. In addition, the delinquency regulations are designed as an administrative means of insuring that registrants comply with the duties they owe to the local boards and the Selective Service System generally, and thus may be analogized to civil contempt procedures. In essence, those regulations seek to render self-defeating any attempt by the registrant to cut himself off from contact with the Selective Service System. Therefore, the delinquency procedure is basically remedial rather than punitive in nature.

But there are some disquieting circumstances surrounding the delinquency reclassifications of petitioner and others who, like him, have violated their duties as registrants by engaging in protest activity. General Hershey's letter of October 26, 1967, which in effect called upon local boards to apply the delinquency re-

classification procedure to "misguided registrants" who engage in "illegal activity" in "violation of the act or regulations" (Pet. Br. App. 1a), appears to have invited local boards to undertake such reclassification in a punitive fashion. Against this background, there is a serious question whether the delinquency regulations are being applied in a manner consistent with the Selective Service Act and the Constitution.

In view of the specific exemption from involuntary military service that Congress has provided for certain categories of individuals and the criminal penalties it has prescribed for violation of a registrant's statutory duties, it is doubtful that Congress intended to permit local boards to reclassify and induct a registrant for any violation of the Act or regulations, regardless of its relation to his status as exempt, deferred, or otherwise. Moreover, although the regulations permit local boards to restore a registrant's prior classification if he remedies his delinquency, they are not required to do so. Delinquency reclassification thus cannot be wholly analogized to civil contempt, since a court cannot continue to subject an individual to sanctions once his compliance has been obtained.

Delinquency reclassification, at least as applied in circumstances like those involved here, also presents constitutional problems. There is a question whether Congress, if it has authorized such reclassification, has provided sufficient standards to guide the local boards, and whether there is a sufficient nexus between the violation that triggers reclassification and induc-

tion and the registrant's status *vis-à-vis* the Selective Service System. Moreover, some of the "tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character" (*Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168) suggest that the delinquency reclassification of petitioner constituted punishment, which was imposed without the constitutional safeguards prescribed for criminal trials.

The question is a difficult one, and the Court need not reach it if it accepts our position (*infra*, pp. 58-66) that delinquency reclassification is unauthorized with respect to registrants who have an express statutory exemption. If that position is accepted, however, it tends to confirm that delinquency reclassification as presently practiced is inconsistent with the Act and probably also unconstitutional.

V. In his complaint, petitioner alleged that he is pursuing a full-time course of instruction in a recognized divinity school, and that he was declared a delinquent and reclassified I-A after he had turned in his draft card. Section 6(g) of the Selective Service Act expressly exempts ministerial students from "training and service" under the Act, and contains no exception for such students who become delinquent. On the other hand, Section 10(b)(3) contains no exception to its sweeping provision that "No judicial review shall be made of the classification or processing of any registrant * * * except as a defense to a criminal prosecution." Although these two provisions of the same statute are not necessarily

inconsistent, there are serious problems of construction in reconciling them.

The unqualified language of Section 10(b)(3) that "[n]o judicial review" of classifications shall be had except as a defense to a criminal prosecution is in fact subject to the qualification that classification may be reviewed through habeas corpus after induction. Moreover, although the ministerial exemption can be fully recognized in a criminal or habeas corpus proceeding, requiring a registrant claiming such status to utilize such procedures subjects him to serious risks which Congress may not have intended. There are also constitutional overtones to the problem. An order to report for induction restrains the freedom of movement of the person who receives it; petitioner's complaint alleges that he turned in his draft card "for the sole purpose of expressing dissent" (A. 3); and the fact that petitioner was declared a delinquent and immediately reclassified I-A without a hearing raises questions under the Fifth Amendment. Finally, the grant of an exemption to ministers from "training and service" under the Selective Service Act is deepseated in our history and tradition, and touches on an area involving First Amendment considerations.

The Solicitor General concludes that, in view of the whole complex of factors here, including (a) the constitutional doubts which might otherwise be raised, and (b) the clear exemption specifically granted by Congress, without qualification, to ministerial students, the statutory provisions involved can best be

reconciled by permitting petitioner to maintain a pre-induction suit challenging his induction order.

The Selective Service System does not agree with those arguments. In order that the Court may have the benefit of its responsibly held views on the issue, we have also set forth its legal position.

The Selective Service System believes that the language of Section 10(b)(3), which provides that there shall be "[n]o judicial review" prior to induction, is clear and unambiguous, and leaves no room for any exception for ministerial students. It believes that the considerations upon which the Solicitor General relies to justify an exception for ministerial students would apply equally to other claims that local boards have acted contrary to the Constitution, the Act or the regulations, and that the practical effect of permitting pre-induction review of classifications would be seriously to interfere with the efficient operation of the Selective Service System. It believes that permitting such suits will lead to many temporary injunctions against induction, and that the result would be to permit those very "litigious interruptions" to the induction process that Congress sought to prevent in barring pre-induction judicial review. The Selective Service System also believes that the delinquency regulations may be applied to a registrant even though he is entitled to a statutory exemption. It points out that such registrants are exempt only from "training and service," and not from registration; and it contends that the regulations are a reasonable means of insuring that all registrants perform their statutory duties relating to registration.

ARGUMENT

INTRODUCTION

This case can be viewed in a broad light, in which event it involves many difficult problems arising under the Selective Service laws. Or it can be viewed in a much narrower way as involving a rather special question arising from the fact that the petitioner here falls within a particular exemption granted by Congress from "training and service" under the Act.

The Court granted certiorari without restrictions; and the case has been broadly briefed on behalf of petitioner. Accordingly, we have discussed the broad questions at some length in this brief. This is put first in the brief, not because we think the broad questions must be decided here, but because the broader discussion provides a useful background for consideration of the narrower issue.

Some of the problems are difficult, and divergent views are held about them. For this reason, an effort has been made to explore the issues carefully and to present some varying arguments which seem to be worthy of the consideration of the Court.

The comprehensive discussion of the issues is presented in points I–IV, at pp. 16–58, below. The narrower issue, on which the case may be decided, is discussed in point V, at pp. 58–74 below. In connection with this issue, although a position is taken, an effort has been made to present countervailing arguments which are strongly held by some government officials, in order that all arguments relevant to the issues may be fully and fairly presented to the Court.

I. SECTION 10(b)(3), WHICH BARS JUDICIAL REVIEW OF SELECTIVE SERVICE CLASSIFICATIONS PRIOR TO INDUCTION, IS CONSTITUTIONAL, EVEN AS APPLIED TO CASES IN WHICH FIRST AMENDMENT CLAIMS ARE MADE.

A. The statute and its legislative history

Section 10(b)(3), as amended in 1967 by Public Law 90-40, in terms bars judicial review of any Selective Service classification prior to induction. In pertinent part, that section provides:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction * * *.

The congressional purpose in enacting this section—which was passed as part of the 1967 amendments to the Selective Service Act—was clear. As stated by the Chairman of the Senate Armed Services Committee, elimination of pre-induction judicial review was necessary "to prevent litigious interruptions of procedures to provide necessary military manpower" (113 Cong. Rec. S8052 (June 12, 1967) (Sen. Russell)).

Prior case law had also established the rule that judicial review of draft classifications could not be obtained until after induction. *E.g., Falbo* v. *United States,* 320 U.S. 549, 551-555; *Witmer* v. *United States,* 348 U.S. 375, 377; *Tamarkin* v. *Selective Service System, Local Draft Board, No. 47,* 243 F. 2d 108 (C.A. 5); *Watkins* v. *Rupert,* 224 F. 2d 47 (C.A. 2); *Schwartz* v. *Strauss,* 206 F. 2d 767 (C.A. 2), affirming

114 F. Supp. 438 (S.D. N.Y.); *Reap* v. *James*, 232 F. 2d 507 (C.A. 4). That approach had been grounded on earlier manifestations of congressional intent found in the pertinent legislation.

Prior to its amendment in 1967, 50 U.S.C. App. 460(b)(3) and its predecessors had provided simply that decisions of Selective Service boards "shall be final" at each administrative level.[3] Congress' purpose in using that language, the courts found, was to establish an expeditious and effective procedure for raising manpower for our country's military needs, without the delays caused by the exercise of judicial review prior to induction (see *Falbo* v. *United States*, 320 U.S. 549, 551–554). Over the years, however, courts had occasionally disregarded or refused to apply this rule. *Townsend* v. *Zimmerman*, 237 F. 2d 376 (C.A. 6); *Ex parte Fabiani*, 105 F. Supp. 139 (E.D. Pa.); *Tomlinson* v. *Hershey*, 95 F. Supp. 72 (E.D.

[3] That language was interpreted as not having been intended wholly to prohibit post-induction as well as pre-induction judicial review of Selective Service classifications, but as merely reflecting a congressional intent to give administrative action in the Selective Service context a more limited scope of review than customarily obtains, so that a classification could be invalidated only if "no basis in fact" therefor existed (*Estep* v. *United States*, 327 U.S. 114, 122–123). In *Estep* the Court distinguished *Falbo* on the ground that there the criminal defendant sought to challenge the local board's action without having pursued and exhausted his administrative remedies (327 U.S. at 123). In amended Section 10(b)(3), the "no basis in fact" standard for post-induction judicial review of classifications is explicity prescribed. In addition, in *Estep* the Court specifically referred to the alternative availability of habeas corpus as a means of obtaining post-induction review of classifications (see 327 U.S. at 123–125).

Pa.).[4] Shortly before the 1967 Selective Service Act amendments were considered by Congress, the Second Circuit, in a case that received widespread publicity, permitted pre-induction judicial review of the reclassification of certain student registrants, on the ground that resort to the courts, although otherwise premature, was permissible when First Amendment rights were clearly involved. *Wolff* v. *Selective Service Local Board No. 16,* 372 F. 2d 817 (C.A. 2).

The 1967 amendments to the Selective Service Act, as passed by the Senate, made no changes in the provision for judicial review. However, the Senate committee emphasized its belief that under the existing statute judicial review prior to induction was not

[4] Of the seven cases cited in petitioner's brief (pp. 43–44) as departing from the prevailing rule prior to enactment of amended Section 10(b)(3), only four actually permitted pre-induction judicial review: *Townsend* v. *Zimmerman*, 237 F. 2d 376 (C.A. 6) (in which the question of pre-induction review was not discussed and apparently was not considered by the court); *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817 (C.A. 2) (which was the decision that prompted the 1967 amendment of the section, and one of the cases that Congress intended to overrule); *Ex parte Fabiani*, 105 F. Supp. 139 (E.D. Pa.); and *Tomlinson* v. *Hershey*, 95 F. Supp. 72 (E.D. Pa.). *Glover* v. *United States*, 286 F. 2d 84 (C.A. 8) and *United States* v. *Willard*. 211 F. Supp. 643 (N.D. Ohio), were criminal prosecutions for failure to submit to induction, and thus did not involve any question of pre-induction review. In his concurring opinion in *Schwartz* v. *Strauss*, 206 F. 2d 767 (C.A. 2), Judge Frank expressed the view that pre-induction review might be available in some circumstances, although not in the situation presented in that case. The majority of the court, however, affirmed on the basis of the district court opinion (114 F. Supp. 438 (S.D. N.Y.)), which held that under no circumstances was pre-induction judicial review permissible.

permissible, stating (S. Rep. No. 209, 90th Cong., 1st Sess. 10):

> Until recently, there was no problem in the observance of the finality provision. In several recent cases, however, district courts have been brought into selective service processing prematurely. The committee attaches much importance to the finality provisions and reemphasizes the original intent that judicial review of classifications should not occur until after the registrant's administrative remedies have been exhausted and the registrant presents himself for induction.

The House Armed Services Committee, however, concluded that merely including in the legislative history a reaffirmation of the original congressional intent was not sufficient, and that the statute should be amended so as explicitly to overrule those few judicial decisions that had allowed pre-induction judicial review. Accordingly, the House committee inserted the language that was finally adopted by the House and accepted by the Senate in conference (H. Conf. Rep. No. 346, 90th Cong., 1st Sess.). The report of the House committee pointedly explained (H. Rep. No. 267, 90th Cong., 1st Sess. 30–31, reprinted at 1967 U.S. Code Cong. & Admin. News 1308, 1333):

> The committee was disturbed by the apparent inclination of some courts to review the classification action of local or appeal boards before the registrant had exhausted his administrative remedies. Existing law quite clearly precludes such a judicial review until after a registrant has been ordered to report for induction and

has responded either affirmatively or negatively to such an order. In view of this inclination of the courts to prematurely inquire into the classification action of local boards, the committee has rewritten this provision of the law so as to more clearly enunciate this principle. The committee was prompted to take this action since continued disregard of this principle of the law by various courts could seriously affect the administration of the Selective Service System.

This legislative history negatives petitioner's suggestion that Congress, in amending Section 10(b)(3), intended to codify those few prior cases which had departed from the general rule and had permitted pre-induction review. Petitioner also asserts that the congressional intent to overrule prior cases such as *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817 (C.A. 2) was addressed only to rulings that registrants could attack their classification prior to exhausting their internal remedies within the Selective Service System of administrative appellate review.[6] On

[6] Although the House Armed Services Committee report states that amended Section 10(b)(3) was intended to overrule cases reviewing classifications "before the registrant had exhausted his administrative remedies" (H. Rep. No. 267, 90th Cong., 1st Sess. 30), the next sentence of the report manifests an intent to codify existing law which "precludes such a judicial review until after a registrant has been ordered to report for induction and has responded either affirmatively or negatively to such an order" (*id.* at 30–31). The committee's reference to exhaustion of administrative remedies may be explained by the existence of judicial authority that a registrant has not exhausted all his administrative remedies—despite completion of adminis-

this matter, petitioner's suggestion is answered by the legislative history, for the primary congressional concern in enacting Section 10(b)(3) was with "litigious interruptions" of the induction process (113 Cong. Rec. S8052 (June 12, 1967) (Sen. Russell)). Such a "litigious interruption" occurs in any case where pre-induction review is sought, particularly where—as usually happens—the suit is not filed until shortly before induction is scheduled. In such circumstances, if there is to be any judicial review before induction, the induction order must be stayed, and a "litigious interruption" of the induction necessarily takes place. And such an interruption ordinarily occurs without regard to whether, and even though, the registrant may have exhausted his administrative remedies. Here, for example, petitioner brought his injunctive action shortly before his scheduled induction date, after completing his administrative appeals, and consequently has received successive stays of induction. This is precisely the sort of "litigious interruption" which Congress sought explicitly to preclude in Section 10(b)(3).

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trative appeals—until he has responded to the order for induction, since he may be rejected at the induction center. See, *e.g.*, *Falbo* v. *United States*, 320 U.S. 549, 553; see also *Billings* v. *Truesdell*, 321 U.S. 542, 558. Indeed, the current regulations (32 C.F.R. 1632.14(b)(6), 1632.15(e), 1632.16), clearly contemplate that a registrant may be found unqualified for induction into the Armed Forces by military personnel at the induction center.

B. The statute does not pose an unconstitutional barrier to judicial review

Section 10(b)(3), as amended in 1967, does not wholly preclude judicial review of a registrant's classification any more than did its predecessor (see note 3, *supra*). Rather, it maintains and makes explicit the congressional determination that such review should be postponed until after induction, or refusal to submit to induction. Petitioner suggests, however, that the practical effect of this scheme is to preclude effective review. Petitioner further argues that, in any event, because of the hardship involved in waiting until completion of the induction process before obtaining review, and since pre-induction review will not seriously disrupt the Selective Service System, the statute erects an unconstitutional barrier to judicial review.[6]

Under Section 10(b)(3), a registrant must either refuse induction and risk criminal prosecution, or submit to induction and seek a writ of habeas corpus, in order to obtain judicial review.[7] Refusal to submit to

[6] Petitioner's view has been accepted in three cases in the Northern District of California. *Petersen* v. *Clark*, Civil No. 47888; *Gabriel* v. *Clark*, Civil No. 49419; and *Scherbatskoy* v. *Local Board No. 76*, Civil No. 49259. The government intends to take a direct appeal to this Court in the *Gabriel* case. No appeal has been taken in the other two cases, since in *Petersen* the district court did not enjoin the registrant's induction nor his pending criminal prosecution for failure to submit to induction, and in *Scherbatskoy* the factual background as well as the legal issues are virtually identical to those in *Gabriel*.

[7] Section 10(b)(3) does not explicitly preserve the habeas corpus remedy. However, the prior cases clearly permitted habeas corpus to test the validity of induction. *Witmer* v. *United States*, 348 U.S. 375, 377; *United States ex rel. Reel* v. *Badt*, 152

induction involves a serious risk, since it subjects the registrant to the possibility of criminal punishment up to five years' imprisonment and a $10,000 fine (50 U.S.C. App. 462(a)). However, a registrant may file a petition for a writ of habeas corpus immediately after induction. Habeas corpus petitions must be accorded precedence on a court's calendar (see 28 U.S.C. 2243), thus keeping the registrant's time in service at a minimum if the court should rule his classification and resulting induction unlawful.[8] However short, that time may well be viewed as a hardship; but it is a hardship which the registrant would share in common with many other citizens.

F. 2d 627 (C.A. 2). The legislative history of Section 10(b)(3) shows that Congress intended to preserve the generally prevailing law with respect to judicial review of Selective Service classifications (see H. Rep. No. 267, 90th Cong., 1st Sess. 30–31). In addition, the statute expressly provides for review after the registrant has responded "affirmatively" to the induction order; such review could only be by habeas corpus, since there would be no basis for a criminal prosecution where there was an affirmative response to the order. There would, of course, be serious doubt as to its constitutional validity if the statute were read as purporting to abolish habeas corpus as a means of contesting the validity of induction (see U.S. Const., Art. I, Sec. 9).

[8] Such post-induction review is neither unattainable as a practical matter nor illusory in terms of substance. In *United States ex rel. Wilkerson* v. *Commanding Officer*, 68 Civ. 1721, decided June 20, 1968, the District Court for the Southern District of New York granted a writ of habeas corpus on the ground that no basis in fact had been shown for the local board's denial of a hardship deferment, and ordered the registrant, who had submitted to induction and promptly filed his habeas corpus petition, released forthwith from the Armed Forces. The government has determined not to appeal from this decision.

Indeed, even without the explicit provisions of the statute, there would be strong reasons for refusing to stay inductions simply to avoid imposing the hardship of some military service on a registrant seeking judicial review of his classification. Since each draft board must fill its quota, a preliminary injunction against the induction of a registrant who has filed suit would necessarily require the induction of another registrant to take his place; it would hardly be equitable to impose military service on one person, or at least accelerate his induction, simply to permit another to obtain pre-induction judicial review. Thus, any hardship involved in requiring that the habeas corpus route be taken may well be viewed as inherent in the fair administration of any system of conscription.

In addition to the hardship involved in military service during the period in which a court is considering a registrant's habeas corpus petition, the habeas corpus route involves an added difficulty for certain registrants who oppose military service for reasons of conscience. These are individuals whose opposition to military service is such that they would refuse to serve regardless of whether a court ultimately upholds the legality of their draft classification. To such an individual, the habeas corpus route is unacceptable because it means that if the court decides he was properly classified, he must complete his military service and is deprived of the alternative of going to prison as the result of a criminal prosecution for failing to submit to induction.

In such a case, however, it is not unreasonable to require the registrant to risk criminal punishment

in order to test the legality of his classification. Indeed, that risk is inherent in such a registrant's decision to regard the claims of his own conscience as being above the ultimate determination of the court. The only effect of Section 10(b)(3) in that situation is to require the registrant to choose between the risk of imprisonment and the risk of a short period of military service before judicial review can be obtained; a pre-induction suit would permit him to defer this choice until the review proceedings had been completed. He would, then, be forced to choose only if the court should sustain his classification. It is by no means clear that the Constitution requires that he be given that opportunity.

To the extent that hardship is involved in precluding pre-induction review, Congress has made a considered determination that the need for postponing judicial review outweighs any countervailing considerations. Such a legislative judgment should obviously be accorded great deference by the courts. This is not an area where the congressional authority to legislate is at all questionable. Indeed, the Court noted in *United States* v. *O'Brien,* 391 U.S. 367, 377, that "[t]he constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping," citing, *inter alia, Lichter* v. *United States,* 334 U.S. 742, 755–758. Congress, acting pursuant to this "broad and sweeping" power, has made manifest its intent in amending Section 10(b)(3) in order, as noted earlier, "to prevent litigious interruption of procedures to

provide necessary military manpower" (113 Cong. Rec. S8052 (June 12, 1967) (Sen. Russell)).

If pre-induction review were generally available, many indivdiuals could be expected to bring suit—as indeed they have notwithstanding amended Section 10(b)(3)—in hopes of avoiding, or at least postponing, military service. Such suits could be anticipated even where the registrant has no expectation of ultimately showing his classification to be unlawful, since the delays occasioned by litigation may well justify the costs of bringing suit, even if ultimately unsuccessful. Moreover, in any case which is not frivolous on the face of the complaint, district courts could be expected to grant temporary restraining orders and preliminary injunctions against induction, since only in this manner could pre-induction challenges be saved from mootness. The fact that others had obtained such interim relief would in turn attract more similar suits.

The decision of Congress that the delays incident to pre-induction review would be contrary to the national interest finds a parallel in a provision of the Emergency Price Control Act of 1942 forbidding temporary injunctions against price control orders. This provision was upheld in *Yakus* v. *United States,* 321 U.S. 414, 437–443, despite the undeniable hardship in requiring a businessman to submit to possibly illegal price control orders during the course of time-consuming procedures for judicial review of such orders. Nonetheless, this Court concluded that Congress could validly place the public interest in prompt effectuation of price controls above the individual's interest in securing interim relief from pos-

sibly illegal administrative orders, stating (*id.* at 441–442):

> Here, in the exercise of the power to protect the national economy from the disruptive influences of inflation in time of war Congress has seen fit to postpone injunctions restraining the operations of price regulations until their lawfulness could be ascertained by an appropriate and expeditious procedure. In so doing it has done only what a court of equity could have done, in the exercise of its discretion to protect the public interest. What the courts could do Congress can do as the guardian of the public interest of the nation in time of war. * * *

As in the Emergency Price Control Act, Congress in the Military Selective Service Act did not preclude judicial review of administrative orders, but rather determined that the effectiveness of these orders was not to be delayed pending judicial review. Congress has always had a broad power to prescribe the modes of judicial review. *E.g., Lockerty* v. *Phillips*, 319 U.S. 182. Its conclusion that postponement of judicial review is necessary to prevent disruption of the induction process is no less a valid exercise of its constitutional authority than the similar determination upheld by this Court in *Yakus*.[9]

[9] Petitioner relies on *Ex parte Young*, 209 U.S. 123, and *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331. Those cases held that federal courts had jurisdiction to enjoin state proceedings under statutes relating to rate regulation, where the state statutes provided no means of review other than in a criminal prosecution for failure to comply with an order of the ratemaking commission. In neither of these cases, however, was

C. No exception from the coverage of Section 10(b)(3) is constitutionally required for cases involving First Amendment claims

Relying on the doctrine of *Dombrowski* v. *Pfister*, 380 U.S. 479, petitioner argues that pre-induction judicial review should be allowed at least in those Selective Service cases that present First Amendment claims. The First Amendment claims here asserted are that petitioner's action in turning in his registration certificate is a form of constitutionally protected "symbolic speech," and that the delinquency regulations are so broadly drafted as to permit administrative interpretations which abridge free speech.

In *Dombrowski* v. *Pfister*, 380 U.S. 479, state criminal prosecutions under a statute invalid on its face were enjoined on the ground that to restrict the presentation of First Amendment contentions to matters of defense in criminal proceedings would result in a "chilling effect" on First Amendment rights. In *Dombrowski*, however, a crucial consideration was that the plaintiffs were not assured a "prompt judicial resolution of First Amendment claims" incident to the normal means of judicial review (380 U.S. at 489).

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there an overriding public interest requiring postponement of judicial review, while here the national interest in the expeditious raising of military manpower supports postponement of review. In addition, in neither *Young* nor *Love* was there a federal statute requiring postponement of judicial review; all the Court was required to decide was that federal equity intervention was warranted because the forms of review open under state law were not adequate. Finally, in those two cases the only form of review under state law required the risk of criminal punishment. Here, by contrast, the registrant may obtain review on habeas corpus by submitting to induction.

That is not the situation here. If review is by habeas corpus, the case must receive precedence on the district court's calendar. And any criminal prosecution resulting from a refusal to submit to induction is required by the statute to be accorded precedence over other cases (see 50 U.S.C. App. 462(a), 462(c), as amended by Public Law 90–40).

Moreover, resolution of the First Amendment claims made in this and similar cases, unlike those in *Dombrowski,* would not require a "series of * * * criminal prosecutions" (380 U.S. at 489). The First Amendment questions which petitioner presents are specific and well-defined (cf. *Zwickler* v. *Koota,* 389 U.S. 241, 250), and there is no reason to believe that their resolution in a habeas corpus action, or a criminal prosecution for failure to submit to induction, would be any less expeditious than in a civil suit. If the administrative practices which petitioner here attacks are in violation of the First Amendment and do have a "chilling effect" on other draft-eligible individuals, a ruling to this effect in a habeas corpus or criminal proceeding would remove this effect just as quickly as the same ruling in a civil injunctive suit.

In any event, the *Dombrowski* doctrine does not have the sweeping scope that petitioner advances. This is shown by this Court's recent holding in *Cameron* v. *Johnson,* 390 U.S. 611. There the Court stated that *Dombrowski* was applicable only where "special circumstances" (380 U.S. at 484) had been shown, and not to prosecutions "for violation of a statute narrowly regulating conduct which is intertwined

with expression * * *'" (390 U.S. at 618). And, as noted in *Cameron,* the statutes under which the prosecutions were brought in *Dombrowski* "were patently unconstitutional on their face * * *" (390 U.S. at 619), in contrast to the situation presented there and here. In language of no less pertinence here, the Court in *Cameron,* relying on *Cox* v. *Louisiana,* 379 U.S. 559, 564, pointed out that "[a]ny chilling effect on * * * a form of protest and expression that flows from good-faith enforcement of [a] valid statute would not, of course, constitute that enforcement an impermissible invasion of protected freedoms" (390 U.S. at 619).

The "litigious interruption" which Congress sought to prevent by Section 10(b)(3) would be occasioned fully as much by suits alleging First Amendment violations, as by any other type of pre-induction action. It thus seems clear that Congress intended the statute to cover cases involving First Amendment questions. Indeed, *Wolff* v. *Selective Service Local Board No. 16,* 372 F. 2d 817 (C.A. 2), which Congress presumably intended Public Law 90–40 to overrule (see H. Rep. No. 267, 90th Cong. 1st Sess. 30–31, quoted *supra,* pp. 19–20), was a case in which a draft classification was attacked on First Amendment grounds. Unlike *Dombrowski,* there is in the instant case a federal statute which precludes pre-induction judicial review on the basis of a well-defined and long-standing federal policy to prevent litigious interruption in the raising of manpower for military service. At least in the absence of clearer indications that pre-induc-

tion judicial review is essential to the protection of First Amendment rights, that congressional policy should be given effect.

D. The existence of "special circumstances" does not justify pre-induction judicial review

Petitioner argues that, even if Section 10(b)(3) is generally valid and applicable to prevent pre-induction review, it should not be read to apply where "special circumstances" are present. While petitioner does not clearly define these "special circumstances," they would apparently be present, in his view, whenever it is claimed that a draft board acted without authority or beyond its jurisdiction.

Such an exception would deprive Section 10(b)(3) of any meaning. This is so because the only ground for reviewing draft board actions in any type of judicial proceeding—whether pre-induction or post-induction—is that the board acted without authority or beyond its jurisdiction (see *Estep* v. *United States*, 327 U.S. 114, 119–123). Section 10(b)(3) of the Selective Service Act, both before and after amendment in 1967, provided that decisions of Selective Service boards are "final" (50 U.S.C. App. 460(b)(3)), and this has been construed to mean that the judicial function is confined to ascertaining whether the board acted within its authority or jurisdiction (see note 3, *supra*).[10] Thus, to permit pre-induction review when-

[10] Moreover, Section 10(b)(3), as amended in 1967, makes explicit the "no basis in fact" standard of judicial review evolved by this Court in *Estep* (see note 3, *supra*).

ever it is claimed that the draft board acted beyond its authority or jurisdiction would be tantamount to concluding that pre-induction review is available for virtually any claim that would warrant post-induction review. The thrust and meaning of Section 10 (b)(3), which draws a sharp distinction between pre-induction and post-induction review, would be effectively nullified by such an interpretation. Such a result could be justified only if the Constitution were shown to require petitioner's suggested "special circumstances" exception.

But, as discussed earlier, nothing in the Constitution precludes Congress from deciding that the need for preventing litigious interruption of the induction process outweighs the hardship to individual registrants caused by the present scheme of judicial review. None of the cases cited by petitioner supports his position. In *Harmon* v. *Brucker,* 355 U.S. 579, the question was whether the action of the Secretary of the Army was reviewable at any time, in the face of a statute making such action "final." This Court held that it had jurisdiction to determine whether the Secretary had acted in excess of his powers—just as it has held that the federal courts may determine whether a draft board has acted in excess of its powers despite the provision of the Selective Service Act making draft board action "final" (50 U.S.C. App. 460(b)(3); *Estep* v. *United States,* 327 U.S. 114). However, in the instant case the question is not whether draft board action may be reviewed at all, but *when* it may be reviewed; neither *Harmon* nor *Estep* are authority for invalidating a statute ex-

pressly providing that judicial review should take place only after, and not before, certain steps are taken.

In *Leedom* v. *Kyne*, 358 U.S. 184, this Court permitted direct review of the National Labor Relations Board's designation of a collective bargaining unit, where the Board had violated the statute by improperly including professional employees in the unit. The Court held that requiring such employees to defer their challenge to the unit until there had been an election and a refusal to bargain "would mean 'a sacrifice or obliteration of a right which Congress has given professional employees" (358 U.S. at 190). Here, by contrast, postponement of review until after induction—despite the hardship it may entail—does not involve "a sacrifice or obliteration" of the registrant's rights. And here such postponement has been expressly required by Congress for compelling reasons of national policy. Indeed, unlike the statute involved in *Leedom*, here the governing statute expressly forbids the type of review which petitioner seeks.[11]

[11] Similarly, *Miller* v. *Nut Margarine Co.*, 284 U.S. 498, and *Allen* v. *Regents*, 304 U.S. 439, are not pertinent. Those cases held that Section 3224 of the Revised Statutes (now 26 U.S.C. 7421), which prohibits suits to restrain the collection of taxes, incorporated the equity rule established by prior case law. The prior case law had included an exception for "special circumstances," and thus it was held that this exception was incorporated in the statute. Petitioners also cite *Lipke* v. *Lederer*, 259 U.S. 557, which involved Section 3224 as well. However, there it was held that the levy sought to be restrained, although a "tax," was in reality a penalty and thus was not covered by the prohibition in Section 3224 on suits to restrain the collection of taxes. Similarly, *Fay* v. *Noia*, 372 U.S. 391, 434–435, involved

In support of his suggested "special circumstances" exception, petitioner also cites a number of cases which premise the right to declaratory and injunctive relief on Section 10 of the Administrative Procedure Act. *Shaughnessy* v. *Pedreiro*, 349 U.S. 48; *Brownell* v. *Tom We Shung*, 352 U.S. 180; *Rusk* v. *Cort*, 369 U.S. 367. But those cases have no application in the Selective Service context, since the Selective Service Act expressly provides: "All functions performed under this title shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237) except as to the requirements of section 3 of such Act [pertaining to publication of regulations]" (50 U.S.C. App. 463(b)). Moreover, in none of those cases was there a statute expressly forbidding declaratory and injunctive relief.

If the foregoing analysis is correct, then apart from the special problem of petitioner's exempt status as a ministerial student, the district court had no jurisdiction, because of Section 10(b)(3), to reach the merits of the case, and the decisions below should be affirmed. If, however, the Court should conclude that Congress cannot constitutionally bar all pre-induction judicial review,[12] then different views of such jurisdiction are possible: (1) that it is narrowly limited to

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the construction of a statute (28 U.S.C. 2254, which makes federal habeas corpus relief available to state prisoners) intended to incorporate prior case law. By contrast, Section 10(b)(3) was intended by Congress to overrule whatever exception for "special circumstances" may have existed in the prior case law which, in any event, generally prohibited pre-induction review.

[12] Both of the courts below adverted to questions other than the validity of the jurisdictional bar, and this Court's granting of certiorari was not limited to that question.

consideration of First Amendment claims, or (2) that it exists more broadly to determine whether the local board exceeded its authority. Under either view, a consideration of the merits of each case becomes necessary. Accordingly, we turn to the merits of petitioner's claims, realizing of course that, since the courts below did not reach the merits, this Court, should it disagree with those courts on the jurisdictional question, may be disposed simply to remand the case for further consideration.[13]

II. A REGISTRANT WHO FAILS TO COMPLY WITH THE POSSESSION REQUIREMENT IS SUBJECT TO DELINQUENCY RECLASSIFICATION

Petitioner argues that the sole consequence of failure to carry a registration certificate is that it constitutes prima facie evidence of failure to register. That contention is grounded on the statement in the second sentence of the pertinent regulation—32 C.F.R. 1617.1—that a registrant's failure to have his certificate "in his personal possession shall be prima facie evidence of his failure to register." Despite the explicit requirement in the first sentence of the same regulation that a registrant shall have his registration

[13] Petitioner's brief purports to set forth three views regarding the proper scope of pre-induction judicial review: (1) that only First Amendment questions may be raised before induction; (2) that such review may be had in "special circumstances"—*i.e.*, presumably in cases in which the draft board is claimed to have exceeded its powers; and (3) that such review may be had in any case where there is a basis for judicial review, since the statutory preclusion of pre-induction review is wholly unconstitutional. However, as we have shown (see *supra*, pp. 31–34), (2) and (3) are in practical effect identical, since the only ground for judicial relief in any type of proceeding—pre-induction or post-induction—is that the draft board has exceeded its delegated powers.

certificate "in his personal possession at all times," petitioner maintains that, in light of the second sentence, the possession regulation could not have been intended to create a duty for the violation of which a registrant could be subject to delinquency reclassification or criminal prosecution.

Selective Service regulation 1617.1 begins by stating, in clear terms, that every registrant "must * * *have in his personal possession at all times his Registration Certificate * * *" (32 C.F.R. 1617.1). As a matter of ordinary grammar, this language creates a duty, and both the delinquency regulations (32 C.F.R. 1642.4 (a)) and the statutory provision prescribing those violations of the Selective Service Act which are criminally punishable (50 U.S.C. App. 462(a)) cover failure by a registrant to perform any "duty" imposed by the Act or regulations. Petitioner, however, argues that the possession requirements does not create a "duty" on two grounds. First, he points out that one purpose of the possession requirement is to provide a registrant with a convenient means of proving to law enforcement officers that he is duly registered and is not a draft evader. He notes that the regulation itself provides that the failure of any person to have a certificate in his possession shall be prima facie evidence of failure to register (32 C.F.R. 1617.1). Second, petitioner relies on the deletion, in 1942, of a separate sentence of the pertinent regulation to the effect that nonpossession of a certificate constituted an express violation of the regulations (7 Fed. Reg. 9683 (November 23, 1942)).

Of course, one purpose of the registration certifi-

cate is to provide registrants with a ready means of proving their registration. But this is not its only purpose. As this Court stated in *United States* v. *O'Brien*, 391 U.S. 367, registration certificates contain information which "facilitates communication between registrants and local boards," and in addition the certificates contain "continual reminders that the registrant must notify his local board of any change of address, and other specified changes in his status" (*id.* at 379). These purposes—as well as the purpose of providing law enforcement officers with a ready means of ascertaining whether a person has registered—are served by a mandatory requirement of possession.

The fact that the regulation specifies that non-possession shall be prima facie evidence of failure to register does not carry the implication that there is no duty of possession. The creation of the evidentiary presumption obviously required specific language in the regulation; and, as petitioner points out, this language was added in 1941 (6 Fed. Reg. 1796 (March 31, 1941)). But the draftsman may well have concluded that, once the regulation stated that every registrant "must" carry his certificate, it was superfluous to add that failure to comply with this requirement was a violation of the regulation. Thus, the deletion in 1942 of the language stating that non-possession was a violation can probably be explained as merely a drafting change which eliminated superfluous language, rather than having been intended to work a change in the substantive effect of the regula-

tion.[14] Significantly, numerous criminal prosecutions were brought during the years 1943–1945 for failure to possess a registration certificate, an enforcement procedure which would obviously have been unavailable were petitioner's reading of the 1942 change in the regulation's wording correct.[15]

Moreover, many of the Selective Service regulations recognized as imposing duties on registrants do not contain explicit language providing that failure to fulfill the duty is a violation. For example, the regulations prescribe a duty to answer questionnaires (32 C.F.R. 1621.10: "the registrant shall complete and return his Classification Questionnaire"); to advise the local board of changes of status affecting classification (32 C.F.R. 1641.7: "It shall be the duty of every classified registrant to keep his local board currently informed" of changes in status); to notify the local board of changes in mailing address (32 C.F.R. 1641.3: "It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him"); and to report for the Armed

[14] Petitioner quotes (Pet. Br. 89) a Selective Service publication stating that the purpose of the 1942 change was "to delete the language stating that it is a violation of the regulations to refuse to exhibit this certificate * * *." Selective Service Regulations, Second Edition, First Printing 437 (1944). This explanation, however, does not indicate whether the intent of the deletion was to effect a substantive change or rather was only a matter of drafting. Moreover, to the extent that the explanation indicates a substantive change, it refers only to the obligation to exhibit the certificate to law enforcement officers (an obligation not contained in the current regulation), rather than the basic obligation to carry the certificate.

[15] See Selective Service System, Special Monograph No. 4, *Regulation and Selective Service* 109 (1945).

Forces physical examination (32 C.F.R. 1628.16: "it shall be the duty of the registrant to report for such examination [when ordered by his board] at the time and placed fixed"). All these and similar duties are imposed by the regulations without any additional language to the effect that failure to comply would constitute a violation. Certainly the draftsman of the possession regulation could understandably conclude that such additional language was unnecessary.

Petitioner's contention, so far as we can determine, has not been raised in any reported case. It is, however, contrary to the result in *Wills* v. *United States,* 384 F. 2d 943 (C.A. 9), certiorari denied, 392 U.S. 908, sustaining a conviction for failure to submit to induction after a delinquency reclassification based on failure to possess a registration certificate, and in *United States* v. *Kime,* 188 F. 2d 677 (C.A. 7), certiorari denied, 342 U.S. 823, sustaining a conviction for failure to possess a registration certificate. It is also inconsistent with several other cases sustaining convictions for failure to comply with regulatory requirements which did not include an express statement that non-compliance was a violation. *E.g., United States* v. *Wain,* 162 F. 2d 60 (C.A. 2), certiorari denied, 332 U.S. 764 (failure to report termination of employment in war industry which was basis for deferment); *United States* v. *Weiss;* 162 F. 2d 447 (C.A. 2) (same); cf. *United States* v. *Haug,* 150 F. 2d 911 (C.A. 2) (failure to report change of address, where the court held that indictment was proper but that error in instructions required new trial); *Stumpf* v. *Sanford,* 145 F. 2d 270 (C.A. 5), certiorari denied,

324 U.S. 876 (habeas corpus refused in case of conviction for failure to report change of address). Petitioner cites no contrary authority, and the consistent administrative practice similarly refutes his suggestion.

III. THE POSSESSION AND DELINQUENCY REGULATIONS DO NOT VIOLATE THE FIRST AMENDMENT

Petitioner was reclassified as a delinquent under a regulation authorizing such reclassification of any registrant who "has failed to perform any duty or duties required of him under the selective service law * * *" (32 C.F.R. 1642.4(a)).[16] Petitioner's local board found that he violated two requirements: that he maintain in his possession a registration certificate (32 C.F.R. 1617.1), and that he keep the local board informed of his current status (32 C.F.R. 1641.7). Both of these requirements, we submit, impose narrowly-defined duties and in no way, on their face, impinge on petitioner's First Amendment rights.

A. The possession regulation does not violate the First Amendment

Selective Service regulations require registrants to keep their registration certificates in their "personal possession at all times" (32 C.F.R. 1617.1). Petitioner argues that this regulation violates the First Amendment as applied to a person who surrenders his registration certificate as a form of political protest or "symbolic speech." However, the "posses-

[16] "Selective service law" is defined to include the rules and regulations issued under the Act (32 C.F.R. 1602.10).

sion" requirement has been upheld against First Amendment challenge by every court of appeals which, expressly or impliedly, has considered the question. See *United States* v. *Miller*, 367 F. 2d 72 (C.A. 2), certiorari denied, 386 U.S. 911; *United States* v. *Kime*, 488 F. 2d 677 (C.A. 7), certiorari denied, 342 U.S. 823; *Wills* v. *United States*, 384 F. 2d 943 (C.A. 9), certiorari denied, 392 U.S. 908; *O'Brien* v. *United States*, 376 F. 2d 538 (C.A. 1), affirmed on other grounds, 391 U.S. 367. Moreover, the reasoning of this Court in *United States* v. *O'Brien*, 391 U.S. 367, plainly supports the validity under the First Amendment of a regulation designed to insure the continuing availability of registration certificates, for it there stated (*id.* at 377–378.).

> The power of Congress to classify and conscript manpower for military service is "beyond question." * * * Pursuant to this power, Congress may establish a system of registration for individuals liable for training and service, and may require such individuals within reason to cooperate in the registration system. The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.

The legitimate and substantial governmental purposes which this Court referred to in *O'Brien* to sustain legislation forbidding destruction or mutilation of registration certificates (*id.* at 378–380) necessarily

sustain the regulatory requirement of continued possession. There, as here, it was argued that the First Amendment protected "symbolic speech," so that a provision designed to assure "the continuing availability of issued Selective Service certificates" was constitutionally infirm (*id.* at 382). That argument was rejected in *O'Brien;* it is unconvincing here.

It may well be that the Selective Service System could operate without registration certificates, but that is a judgment neither for the courts, as this Court concluded in *O'Brien,* nor for petitioner to make. As delineated in *O'Brien,* these certificates do serve a "legitimate and substantial purpose in the system's administration" (*id.* at 378), and thus their continuing availability may validly be required.[17] Nor does a regulation requiring continued possession deprive registrants of effective means of communicating political protest to the public at large. Protest marches and rallies, conducted wholly in accordance with law, frequently receive extensive newspaper and television coverage.

B. The delinquency regulations are not impermissibly vague

Petitioner contends that the delinquency regulations are impermissibly vague and readily lend them-

[17] Petitioner's suggestion that the information contained in registration certificates is in any event continuingly available to the government because of the existence of Selective Service System files, of course, pertains to the situation involved in *O'Brien* as well. Moreover, the notion that surrendered certificates remain available since in governmental possession ignores the point that possession *by the registrant* is what both the regulations, and the Court's discussion in *O'Brien*, plainly contemplate.

selves to an interpretation resulting in the denial of First Amendment rights. These regulations, as noted, authorize reclassification of a registrant who "has failed to perform any duty or duties required of him under the selective service law * * * " (32 C.F.R. 1642.4(a)). This language thus simply incorporates the provisions of the Selective Service Act and regulations imposing certain duties on registrants, and petitioner has not shown that any of these provisions are impermissibly vague or overbroad. In particular, the duties involved in this case—the duty to carry a registration certificate at all times (32 C.F.R. 1617.1) and the duty to keep the local board informed of the registrant's status (32 C.F.R. 1641.7)—are specific and narrowly defined.

In arguing that the delinquency regulations are susceptible of an interpretation denying First Amendment rights, petitioner points to certain statements in a letter dated October 26, 1967, written by General Hershey, Director of Selective Service, to the Selective Service System generally (Pet. Br. App. 1a). If those statements are interpreted as authorizing local boards to reclassify registrants on the basis of any conduct deemed by the board to be contrary to the national interest, including acts of political protest, then serious constitutional problems would result. If the Director of Selective Service has interpreted the delinquency regulations too broadly, the proper response is to correct his interpretation rather than to invalidate the regulations themselves.

The meaning and likely effect of the Director's letter may nonetheless be relevant in determining wheth-

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er the delinquency regulations may validly be applied in circumstances like those involved here.[18] We now turn to that issue.

IV. IT IS QUESTIONABLE WHETHER THE DELINQUENCY RECLASSIFICATION OF PETITIONER WAS AUTHORIZED BY THE STATUTE, AND WHETHER IT WAS CONSTITUTIONALLY VALID

Preliminarily, we note that the remaining contentions relating to the merits of the case are not grounded on the First Amendment. Thus, they would be reached only under an approach to pre-induction judicial review which permits any question concerning a draft board's compliance with the Constitution, the Selective Service Act, or the Selective Service regulations to be reached in a pre-induction suit, contrary to the express terms of Section 10(b)(3). But the contentions are made at length by petitioner, and the Court's grant of certiorari was not limited to the jurisdictional question. Moreover, since at least one of the contentions poses a serious and important issue, we think it appropriate to attempt to provide a thorough response.

[18] We are aware of only four instances where local boards may have interpreted General Hershey's letter to authorize reclassification of registrants on the basis of activities unrelated to their duties as registrants. In three of these cases—*Huey*, *Peffers and Hess*, and *Ratliff* (see Pet. Br. 17–18, n. 8, 74–75)—the reclassification was reversed administratively. The fourth case—*Connell* (see Pet. Br. 18, n. 8)—is presently before the New York State Appeal Board, and we are advised that the State Director of Selective Service has requested the appeal board to restore Connell's prior classification. Apart from these instances, the cases cited by petitioner all involve registrants found to have violated a specific provision of the Selective Service law or regulations. Most of these cases, like the present one, involve non-possession of draft cards.

In attacking the delinquency regulations, the burden of petitioner's argument rests on his characterization of his reclassification as "punitive." This characterization is in some respects misleading. The delinquency regulations can be viewed as an administrative means of ensuring that the registrant complies with the duties, statutory and otherwise, which he owes to his local board and the Selective Service System. Pursuant to the regulations, any registrant who "has failed to perform any duty" required of him under the Selective Service Act and regulations may be declared a delinquent and placed by reclassification in the highest priority for induction (32 C.F.R. 1642.4 (a), 1631.7(a)). In this manner, the registrant who seeks to avoid the draft finds, instead, that his induction might be accelerated because of his interference with the system's orderly functioning.

Since the regulations seek to render self-defeating any attempt by the registrant to cut himself off from contact with the Selective Service System, it might be said that they are basically remedial rather than punitive in nature. Indeed, at least one of the purposes of delinquency reclassification is to bring registrants back into compliance with their duties and thus enable the Selective Service System to operate effectively, rather than to punish registrants for past violations. Until the moment of induction, a reclassified registrant has the opportunity, albeit not the right, to have his delinquency status changed if he corrects his default. His local board may, in its discretion, restore a delinquent registrant to his prior classification without the restrictions

against reopening classifications which would otherwise be applicable (32 C.F.R. 1642.4(c), 1642.14).[19] Accordingly, the delinquency regulations might be viewed as a remedial sanction, since they are a means whereby the Selective Service System can compel registrants to perform their duties under the pertinent laws and regulations.

Petitioner apparently does not contest this characterization of the delinquency regulations, and would seemingly not quarrel with their application to the case of an individual who failed to register or failed to notify his board of his whereabouts. Petitioner argues, however, that the regulations should be interpreted as applying only to duties pertaining to the classification and induction process. Only such an interpretation, petitioner contends, can be squared with the Constitution and the Selective Service Act. Reclassification on the basis of actions of a registrant which do not pertain to the classification and induction process, petitioner asserts, would constitute the administrative imposition of punishment without constitutional safeguards such as trial by jury—a result authorized neither by the Act nor the Constitution.

Perhaps there is no occasion here for determining whether the delinquency regulations might in some circumstances be enforced so as to result in an impermissible "punitive reclassification." Petitioner's assertion that the registrant's duty to carry his draft card does not pertain to the classification and induction

[19] There are numerous cases where registrants, who had been declared delinquent after turning in their registration certificates or notices of classification, had their prior deferments restored after requesting their local draft board to reissue the surrendered certificate.

process is at least a dubious one. Registration is a necessary, preliminary step to classification and induction. As the Court stated in *United States* v. *O'Brien*, 391 U.S. 367, 377, individuals may be required "within reason to cooperate in the registration system." Not only is "[t]he issuance of certificates indicating the registration and eligibility classification of individuals * * * a legitimate and substantial adminstrative aid in the functioning of this system "(*ibid.*), but, the Court further concluded, "the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration" (*id.* at 378).

The requirement of personal possession of registration certificates is thus calculated to make the entire system operate more effectively. The possession regulation aids the administration of the registration system by assuring the continuing availability of issued registration certificates. Most of the purposes served by those certificates, as delineated by the Court in *O'Brien* (*id.* at 378–380), "would be defeated" no less by their continued non-possession by registrants than by "the certificates' destruction or mutilation" (*id.* at 378). Thus, it might be concluded that the possession regulation is closely related to the classification and induction process, and is an appropriate subject for enforcement through the remedial administrative mechanism of the delinquency regulations.

However, petitioner's attack on the delinquency regulations is not limited to his contention that the failure to carry a registration certificate is not properly enforceable thereunder. He maintains, more

broadly, that the delinquency regulations are not authorized by the Selective Service Act, and, in any event, cannot constitutionally be invoked to punish political protest directed against governmental policy. These are serious and substantial claims, and cannot be brushed aside lightly.

In evaluating petitioner's challenge to the delinquency regulations in these respects, some background is helpful. The delinquency regulations have been in effect, in substantially their present form, since enactment of the revised Selective Service law in 1948.[20] Indeed, the present regulations are similar to the delinquency regulations in effect during World War II.[21] During this lengthy period, Congress was presumably aware of these regulations, but did not see fit to rescind or change them. Moreover, when the Selective Service Act was extensively amended in 1967, the congressional committee reports explicitly recognized the existence of the delinquency regulations (S. Rep. No. 209, 90th Cong., 1st Sess. 3, 6; H. Rep. No. 267, 90th Cong., 1st Sess. 17). Indeed, Congress, in enacting the 1967 amendments, not only failed to modify or weaken the delinquency regulations, but instead inserted a provision in the statute which, for the first time, gives express recognition to

[20] Selective Service System Regulations, Sections 631.7, 642.13; 13 Fed. Reg. 5479, 5483 (September 21, 1948).

[21] Selective Service System Regulations, Section 601.5; 6 Fed. Reg. 6825 (December 31, 1941); Selective Service System Regulations, Sections 642.1, 642.12, 642.13; 8 Fed. Reg. 14116 (October 19, 1943).

their existence.[22] Thus, these regulations might be viewed as a recognized and long-established feature of the Selective Service System, which Congress, implicitly and now explicitly, has authorized and approved.

However, neither the antiquity of the delinquency procedure nor the apparent congressional sanction which the regulations have received precludes an inquiry into whether the manner of their application in particular cases is consistent with the Act and the Constitution. If the essential purpose actually underlying delinquency reclassification is to punish registrants for their failure to comply with their duties under the Selective Service law and regulations, a serious constitutional question is raised, since none of the required constitutional safeguards traditionally associated with criminal punishment are provided.

As petitioner points out, the leading case on this point is *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144. There, however, the Court noted that one test of whether a sanction is penal in nature is "'whether it has historically been regarded as a punishment'" (*id.* at 168). Service in the Armed Forces of this country has traditionally been considered a privilege, or at least an accepted duty of citizenship, and not

[22] That provision—Section 6(h) of Public Law 90-40, amending 50 U.S.C. App. 456(h)—refers in terms only to the priority induction status of delinquents—a basic feature of the regulations. In using the term "prime age group" in connection with student deferments, the section defines that term to mean "the age group from which selections for induction into the Armed Forces are first to be made *after delinquents* and volunteers" (emphasis added).

a criminal punishment. Persons with military records have traditionally pointed to their service with pride, and military service normally entitles an individual to a variety of veterans' benefits under both state and federal law. This is in striking contrast to the effect of the "record" of an ex-convict. Any burdens and hardships involved in military service have generally been regarded as conferring honor and credit on a man, rather than the stigma associated with criminal punishment. Thus, the fact that military service involves a certain amount of physical restraint[23] does not necessarily mean that induction following delinquency reclassification constitutes a penal sanction.

On the other hand, where a draft board utilizes delinquency reclassification to seek retribution against an individual for some activity he has engaged in, wholly unrelated to his duties as a registrant, then it could well be concluded that the board had in effect utilized reclassification and induction as a form of punishment, contrary to its traditional purpose and despite the nature of military service as a general matter. In essence, this is what happened in *Wolff* v. *Selective Service Local Board No. 16,* 372 F. 2d 817 (C.A. 2). In that case registrants were reclassified for protest activity which was not directly related to any duties pertaining to their own registration or classification. There the court of appeals noted that "no regulation authorizes a draft board to declare a reg-

[23] It is an accepted proposition that habeas corpus lies to secure release from the Armed Forces in appropriate circumstances. *E.g., Eagles* v. *United States ex rel. Samuels,* 329 U.S. 304.

istrant a delinquent or to reclassify him for such action" (*id.* at 821), and concluded that "it is not the function of local boards in the Selective Service System to punish * * * registrants by reclassifying them I–A because they protested * * * the Government's involvement in Vietnam" (*id.* at 822). That is a conclusion from which it is extremely difficult, if not impossible, to dissent.

But the situation here might be viewed as differing significantly from *Wolff*. In that case it could not be said that the reclassification was remedial—designed to enforce duties owed by the registrants to their local boards. Rather, it was obviously penal—directed simply toward punishing the registrants for their protest activity, *i.e.*, "sitting in" at a local board. Here, by contrast, petitioner violated specific, continuing, and affirmative duties imposed on him by the regulations and which he owed to his local board. Moreover, unlike the registrants in *Wolff*, petitioner could have sought to correct his violations at any time, subject to the board's discretion as to whether it would restore his prior classification.[24] Accordingly, *Wolff* is

[24] This consideration answers petitioner's contention that his reclassification violated the procedure the regulations (32 C.F.R. 1642.4, 1642.10) prescribe, because there was no interval between the notice of delinquency and the notice of classification sent to him by his local board. Although the regulations do not specify that there must be such an interval, presumably some period should elapse. But the only purpose of such interval would have been to enable petitioner to cure his violations by requesting issuance of a new registration certificate and informing the board of his current status. Although petitioner had ample opportunity to correct his status during the six-week period between the mailing of his notice of classification on November

not dispositive, and petitioner's delinquency reclassification may be viewed as remedial and not penal since designed simply to bring him back into compliance with his duties as a registrant.

Nonetheless, that conclusion may be too simplistic, especially in view of the disquieting circumstances which surround the delinquency reclassification of petitioner and others who, like him, have violated their duties as registrants by engaging in protest activity. In evaluating the purpose toward which the delinquency reclassification of such registrants has been directed, the views expressed by General Hershey in his letter of October 26, 1967, cannot be treated as irrelevant. That letter, in effect, called upon local boards to apply the delinquency reclassification procedure to "misguided registrants" who engage in "illegal activity" in "violation of the act or regulations" (Pet. Br. App. 1a). It is difficult to conclude that these statements did not in effect invite local boards to utilize delinquency reclassification in a punitive fashion. Despite their autonomy in such matters, it might be expected that the local boards would act upon such an invitation. The considerable number of cases in recent months involving delinquency reclassifications confirms that local boards have in fact so proceeded. Against this background, a serious question is posed whether the delinquency

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7, 1967, and his induction order of December 27, 1967 (A. 4), he makes no allegation that he sought to do so. While petitioner pursued and exhausted his administrative remedies during this period, his approach throughout was to challenge the legality of his reclassification (A. 4, 8), and there is no allegation that he ever attempted to correct his status.

regulations are being applied in a manner consistent with the Selective Service Act and the Constitution.

Congress' purpose in enacting what is now called the Military Selective Service Act was to provide "an adequate armed strength" so as to ensure the security of the country (50 U.S.C. App. 451(b)), "in accordance with a system of selection which is fair and just" (50 U.S.C. App. 451(c)). Congress accordingly established a Selective Service System, and prescribed a registration and classification process directed toward the accomplishment of its basic objective. Certain classes of individuals, for a variety of policy and other reasons, have been given exemptions and deferments from involuntary military service (50 U.S.C. App. 456, as amended by Public Law 90–40). One section of the statute relates specifically to the manner of selecting men for training and service, and provides that such selection "shall be in an impartial manner" (50 U.S.C. App. 455, as amended by Public Law 90–40). Congress further prescribed criminal penalties for those who knowingly fail to perform any duties required of them as registrants under the Act or Selective Service regulations (50 U.S.C. App. 462). Considering this legislative background, it is at least questionable whether Congress intended to sanction an administrative procedure which can result in the compelled induction of those registrants who in any manner fail to comply with any of the duties prescribed by the Selective Service regulations, regardless of their status under the Act.

It may be assumed that Congress has now approved of and authorized some sort of delinquency procedure.

But that does not resolve the question whether that procedure can be applied, consistent with the underlying congressional intent, in all situations involving violations of the Act of the regulations. Some of the duties imposed on registrants bear a rather direct relationship to their status as draft-eligible citizens, such as the requirement to register and to keep the local board informed of one's location and educational situation. Other duties have no such nexus, or an attenuated one at best. Yet the delinquency regulations are by their terms applicable to any registrant who fails to perform "any duty or duties required of him under the selective service law," except the duty to report for induction when so ordered (32 C.F.R. 1642.4(a)).

It is difficult to believe that Congress intended the local boards to have the unfettered discretion to decide that any violation of the Act or regulations warrants a declaration of delinquency, reclassification and induction, regardless of its relationship to the individual's status as exempt or deferred or whatever. Congress prescribed criminal prosecution for such violations, and also provided for exemptions and deferments for certain classes of individuals to reflect considerations of national interest apart from simply raising manpower for the Army. Termination of such status through delinquency reclassification may effectively undermine that congressional determination and thus be inconsistent with the Selective Service Act.

In addition, although the regulations authorize the restoration of individuals to their prior classification if they remedy their delinquency, that decision is left

wholly to the discretion of the local boards (32 C.F.R. 1642.4(c), 1642.14). The analogy to civil contempt is thus incomplete; a court has no authority to continue the subjection of an individual to sanctions once his compliance has been secured. Thus, it may similarly be doubted that Congress intended the local boards to have such complete authority in revoking delinquency reclassifications. It is no answer to say that Congress must have so intended, because it sought to shield board decisions from pre-induction judicial review by enacting Section 10(b)(3). To the contrary, that consideration may well support the view that Congress intended the boards to exercise their authority in a circumspect and cautious fashion, since, to the extent that section is applicable, their decisions would be reviewable only after induction or refusal to submit thereto, and then only in terms of whether a "basis in fact" existed for the reclassification.

Whether delinquency reclassification accords with the Act thus presents a serious and difficult question. We note that District Judge Dooling recently set forth persuasively the reasons for a negative answer in a presently unreported opinion in *United States* v. *Eisdorfer*, No. 67 Cr. 302, decided June 24, 1968 (E.D.N.Y.). While we do not necessarily agree with all of his statements, it may be helpful to the Court to quote the pertinent passages from that well-considered opinion. As a matter of convenience, those passages are reprinted in Appendix A (*infra*, pp. 75-77).

Apart from whether delinquency reclassification, at least as applied in circumstances like those involved

here, is consistent with the congressional intent in enacting the Selective Service Act, constitutional problems may be presented as well. In the first place, if the delinquency regulations are regarded as having congressional authorization, it may be questioned whether the delegation of power to the Selective Service boards, without standards for the exercise of the sweeping discretion given them by the regulations,[25] comports with the Constitution. *E.g., Zemel* v. *Rusk,* 381 U.S. 1, 17–18; *Greene* v. *McElroy,* 360 U.S. 474, 507–508. Moreover, the absence of any specified nexus or reasonable relationship between the violation which triggers reclassification and induction, and the registrant's status *vis-à-vis* the Selective Service System, might be viewed as inconsistent with due process notions. Cf. *Perez* v. *Brownell,* 356 U.S. 44, 58; *Tot* v. *United States,* 319 U.S. 463, 467. And, most importantly, it is at least questionable whether the rationale of *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, can be distinguished simply by maintaining that military service, unlike expatriation, has not been traditionally viewed as punitive in nature (see *supra,* pp. 49–50).

In reciting "the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character," the Court in *Mendoza-Martinez*

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[25] Moreover, this Court has repeatedly referred to and applied the proposition that delegations of congressional authority to administrative agencies should be narrowly construed where necessary to avoid any constitutional questions which might otherwise be presented. *E.g., Kent* v. *Dulles,* 357 U.S. 116, 129; *United States* v. *Rumely,* 345 U.S. 41, 46–47; see also *United States* v. *Robel,* 389 U.S. 258, 272–282 (Brennan, J., concurring).

referred not only to whether the sanction "has historically been regarded as a punishment" (372 U.S. at 168), but also to a number of other considerations, most of which might be viewed as supporting the conclusion that delinquency reclassification, especially in light of General Hershey's letter and the manner of that procedure's application in this and similar cases, does constitute criminal punishment. Indeed, the appropriate question may well be not whether military service as such constitutes punishment, but whether the subjection of a registrant to the entire process of delinquency, reclassification and induction amounts, in the present circumstances, to the imposition of a penal sanction. As petitioner points out, it can hardly be gainsaid that the subjection of an individual to this process produces "an affirmative disability or restraint" (*id.* at 168), promotes "the traditional aims of punishment—retribution and deterrence" (*ibid.*), and involves the application of a sanction to "behavior * * * which * * * is already a crime" (*ibid.*). Thus, a sound argument can be made that, under the criteria spelled out in *Mendoza-Martinez*, application of the delinquency and reclassification procedure to registrants like petitioner, in view of the surrounding circumstances, actually results in the imposition of punishment without the constitutional safeguards prescribed for criminal cases, particularly under the Fifth and Sixth Amendments.

What conclusion should be reached, in view of the competing considerations regarding the general validity of delinquency reclassification, is not an easy question. Should the Court accept the position taken

below that that procedure is unauthorized, at least with respect to individuals like petitioner who have been given an express statutory exemption from military training and service (*infra*, pp. 58–66), it is unnecessary to reach the general question in the instant case. Assuming the validity of that position, however, it tends to confirm the view that delinquency reclassification, at least as regards the broad scope given that procedure under the regulations, is inconsistent with the Act and probably unconstitutional as well.

V. PRE-INDUCTION JUDICIAL REVIEW OF PETITIONER'S RECLASSIFICATION SHOULD BE PERMITTED IN ORDER TO RECONCILE SECTION 10(b)(3) OF THE SELECTIVE SERVICE ACT WITH THE CONGRESSIONAL DETERMINATION IN THE SAME STATUTE THAT A MINISTERIAL STUDENT "SHALL BE EXEMPT FROM TRAINING AND SERVICE" UNDER THAT ACT

In addition to the general problems already discussed, the present case presents a further specific question.

In his complaint before the district court, petitioner alleged that he is "a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full time course of instruction in a recognized theological or divinity school" (A. 3). The accuracy of this allegation is admitted, for the purposes of the present proceeding, by the government's motion to dismiss (A. 12).

Congress has provided in Section 6(g) of the Selective Service Act (50 U.S.C. App. 456(g)) that such

a student "shall be exempt from training and service" under the Act. This case thus presents the question of the interrelation of this express statutory exemption with the procedural provision in Section 10(b)(3) which bars pre-induction judicial review of Selective Service classifications.[26]

The complaint alleged (A. 4) that petitioner was classified as IV–D, which is the classification for ministerial students, that, following his turning in his draft card, he was declared a delinquent and on the same day was reclassified as I–A, that he appealed from this reclassification, and thereafter received an order to report for induction. It was at this point that he brought the present proceeding.

We have here two explicit statutes, neither of which contains any qualification or exception. One provides that ministerial students shall be exempt. The other provides that "no judicial review shall be made of the classification or processing of any registrant * * * except as a defense to a criminal prosecution." Both provisions are part of the same statute—the Selective Service Act—though enacted at different times. It cannot be said that the two statutory provisions are necessarily or inherently inconsistent. But there are serious problems of construction.

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[26] According to the complaint (A. 4), the delinquency notice advised petitioner that he was also declared a delinquent because of "failure to provide the local board [with notice] of his current status." This apparently related to petitioner's continuing status as a student enrolled in a recognized divinity school, although this is not substantiated by the record. Such a failure was, however, denied in the complaint (A. 4).

1. In the first place, despite the sweeping language of Section 10(b)(3)—"[n]o judicial review shall be made of the classification or processing of any registrant * * * except as a defense to a criminal prosecution * * * after the registrant has responded either affirmatively or negatively to an order to report for induction"—this provision *is* subject to an exception or qualification in that review may be had, after induction, not only through a criminal prosecution but also by habeas corpus. This is surely a means of "judicial review" other than by "criminal prosecution." The exception is justified in part because of the legislative history of the statute, and in part because of the word "affirmatively" in the statute itself, which has little or no meaning in relation to a criminal prosecution. The basic reason for this construction, however, must be constitutional. Article I, Section 9, Clause 2 of the Constitution provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended," with an exception which is not relevant here. In order to avoid the constitutional problem that would arise if the statute were construed to bar habeas corpus, it is accepted that the statute does not preclude such review despite the fact that no such qualification is stated in the sweeping language of the statute. See *Estep* v. *United States*, 327 U.S. 114, 123–125.

Are there other qualifications which are necessary for a sound construction of these statutory provisions?

2. The two paragraphs involved here are not verbally inconsistent. It is *possible* to have review only

through criminal prosecution, or through habeas corpus, and to have the ministerial exemption recognized at that point. But there are difficulties. After a draft board issues a notice of induction, a registrant is surely in peril if he refuses to comply with it, and he may find himself effectively in service, if he does comply with it. It might be claimed that he had waived his exemption by responding affirmatively to induction, and he may be held not to have exhausted his administrative remedies if he refuses to accept induction. See *Falbo* v. *United States*, 320 U.S. 549, 553. Moreover, he does not have an opportunity to find out in advance whether he is wrong, and to decide then whether to take the penalty or to accept the legal conclusion as to his status. He must take the risk in order to find out whether he is subject to a penalty.

All this may be within the power of Congress. The question remains how the statutory provisions, each, unqualified in terms, should be fitted together as a matter of statutory construction, to make a coherent statutory scheme.

3. The issuance of an order to report for induction is surely a restraint on the freedom of movement of the person who receives it. It requires him to be at a certain place at a certain time, or else suffer criminal penalties. It has been held that the writ of habeas corpus is available to review the propriety of such an order. *Ex parte Fabiani*, 105 F. Supp. 139 (E.D.Pa.) (McGranery, J.), cited by this Court in *Jones* v. *Cunningham*, 371 U.S. 236, 240. The *Fabiani* decision was disapproved in *Lynch* v. *Hershey*, 208 F. 2d 523 (C.A.

D.C.), certiorari denied, 347 U.S. 917. But it may be supported by more recent extensions of the scope of the writ of habeas corpus. *Jones* v. *Cunningham, supra* (parole); *Walker* v. *North Carolina,* 262 F. Supp. 102 (W.D.N.C.) (suspended sentence), affirmed on other grounds, 372 F. 2d 129 (C.A. 4), certiorari denied, 388 U.S. 917. See also *Carafas* v. *LaVallee,* 391 U.S. 234, 237. If the writ of habeas corpus is available in such cases, then the denial of judicial review before refusing or accepting induction may amount to a suspension of the writ. We do not urge that such is the case, but think the problem is a relevant consideration in determining how these two unqualified statutory provisions should be construed.

4. There is clearly a First Amendment element in this case. The complaint alleges that the petitioner turned in his draft card "for the sole purpose of expressing dissent" (A. 3).

There are also questions under the Fifth and Sixth Amendments. The petitioner was declared a delinquent without a hearing, and was reclassified I-A on the same day, also without a hearing. The consequence was the order to report for induction. Although this may not be "punishment" for crime in the constitutional sense, the argument that it was a governmental sanction, involving loss of liberty, imposed because of violations of regulations, is not wholly specious. To the extent that this argument has substance, it raises questions with respect to the need for "indictment of a Grand Jury," under the Fifth Amendment, and with respect to the right to trial by jury, and to counsel under the Sixth Amendment.

Many of the foregoing considerations would be applicable to any registrant who was reclassified on delinquency grounds. There is the further element in this case that petitioner falls in a class to whom Congress has granted an explicit exemption "from training and service" under the Selective Service Act. The grant of exemption to ministers is deepseated in our history and tradition. It clearly has First Amendment overtones. A necessary corollary of that exemption, and equally traditional, is the exemption granted to students for the ministry. Despite the sweeping language of Section 10(b)(3) of the Selective Service Act, added in 1967, there is no reason to believe that Congress actually intended to repeal the exemption expressly granted to ministers and ministerial students to permit reclassification because of a violation of a regulation, of possibly doubtful meaning and effect, and not of one of the provisions of the statutes enacted by Congress itself. In such a case, the two statutory provisions should be construed so as to give as much effect as possible to each of them. The situation here is in some ways similar to that in *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 488–489, where this Court said:

> We are dealing with hasty legislation which Congress did not stop to perfect as an integrated whole. Our task is to give all of it—1917 to 1941—the most harmonious, comprehensive meaning possible. * * * To do otherwise would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.

Of course, it is possible to say that the effect of Section 10(b)(3), even in the face of Section 6(g), is that petitioner should have waited until the time fixed for his induction, should then have refused to submit to induction, and should, finally, have raised his defense in a criminal prosecution. However, in view of the explicit exemption granted by Section 6(g), the Attorney General would not have started such a prosecution, and if he did, it would have been the clear duty of the court to have dismissed the prosecution on a showing that petitioner comes within the exempted class. In such a situation, it can hardly be a proper construction of the statutory provisions which "requires the courts to march up the hill when it is apparent from the beginning that they will have to march down again" (*Estep* v. *United States*, 327 U.S. 114, 125).

Courts have long been confronted with the problem of construing and applying statutory provisions which, because of their sweeping terms, their overlap, or otherwise, are superficially inconsistent. The settled practice is to interpret them so as to do the least violence to each of them, while at the same time best effectuating the overall design of the statute. *Williams* v. *Pritchard*, 4 Term Rep. 2; *Peck* v. *Jenness*, 7 How. 612, 623;[27] *New Lamp Chimney Co.* v. *Anaonia Brass and Copper Co.*, 91 U.S. 656, 663; *United States* v.

[27] In *Peck* the Court stated: "One portion of a statute should not be construed to annul or destroy what has been clearly granted by another. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another, so that all may stand together."

Moore, 95 U.S. 760, 763.[28] See also *Spies* v. *United States*, 317 U.S. 492; *Achilli* v. *United States*, 353 U.S. 373; *Sansone* v. *United States*, 380 U.S. 343.

The construction of Section 10(b)(3) here urged need, as far as this case is concerned, extend only to those classes of persons who have been expressly granted an exemption from training and service by the act of Congress. Although the statutory terminology differs, and not all are phrased as "exemptions," these would appear to include no others, in addition to ministers and ministerial students, than persons under 19 years of age (50 U.S.C. App. 454, 455), veterans of military service (50 U.S.C. App. 456(b)), members of the National Guard and reserves (50 U.S.C. App. 456(c)), and sole surviving sons (50 U.S.C. App. 456(o)). The argument need not extend to persons who are deferred, such as students, because they remain liable for service and training, with only the time of service subject to adjustment. The situation of conscientious objectors is uncertain (see 50 U.S.C. App. 456(j)). The question of the validity of a claim to conscientious objector status may be one of great difficulty and cannot be as readily determined on an objective basis, as the other grounds for exemption. The determination of such status involves more of the process of "classification" that Congress has committed to the discretion of the local boards. It is also a situation where the disruption of the orderly process of obtaining military manpower would

[28] In *Moore* the Court stated: "In cases like this, the construction should be such that both provisions, if possible, may stand."

be greater than in the case of the clear and direct exemptions specifically granted by Congress. Moreover, it would rarely be presented in conjunction with the problem of the applicability of the delinquency regulations, which is involved here. However, none of these questions need be determined in this case.

It is enough here to conclude that the statutory provisions involved can best be reconciled by permitting petitioner to maintain a pre-induction suit challenging his delinquency reclassification, in view of the whole complex of factors here, taken together, including (a) the constitutional doubts which might be raised on these particular facts, including the applicability of the delinquency regulations, and (b) the clear exemption specifically granted by Congress, without qualification, to ministerial students. Since, on the basis of this analysis, the local board lacked the authority in the face of an express statutory exemption to reclassify petitioner and order him inducted, the judgment below should be reversed and the cause remanded with directions to hold a hearing at which the petitioner would be given the opportunity to prove the facts alleged in his complaint, including the jurisdictional amount required by 28 U.S.C. 1331, and, if these facts are found to exist, to enter a decree in favor of the petitioner.

The agency charged with the administration of the statute involved here, the Selective Service System, does not agree with the arguments which have just been presented. In order that the Court may have the

benefit of its responsibly held views with respect to the construction and application of the Act, the legal position supported by the Selective Service System is stated in the remaining portion of this brief.[29]

The Selective Service System maintains that, in light of Section 10(b)(3), the merits of petitioner's classification may not be reached in this suit, and that, in any event, delinquency reclassification may be applied to ministers and ministerial students as well as to other registrants. Thus, the Selective Service System contends that the judgment below should be affirmed.

In the view of the Selective Service System, the language of Section 10(b)(3) which forbids "judicial review * * * of the classification or processing of any registrant by local boards" prior to induction is clear and unambiguous. There is thus no basis to read an exception into the statute. Neither is there any reason to distinguish, for purposes of permitting pre-induction suits, between violation of the statute itself and violation of the regulations.

Nor, in the view of the Selective Service System, does a local board have authority under the Selective Service Act to act contrary to the Constitution (cf. *Greene* v. *McElroy*, 360 U.S. 474). Surely a registrant alleging a constitutional violation would be entitled to at least the same degree of procedural protection as

[29] This statement of the position of the Selective Service System is based upon a memorandum prepared by counsel for the Director of the Selective Service System, which was lodged with this Court in April 1968. It has been submitted to counsel for the System and the changes requested have been made.

a registrant alleging that his board had acted contrary to the statutory exemption for ministerial students. Thus, the Selective Service System feels that an exception to Section 10(b)(3) cannot be confined to the limited factual situation presented here. If ministers and ministerial students can obtain pre-induction judicial review, this procedural protection cannot consistently be denied to any registrant claiming that his local board has violated the Constitution, the Selective Service Act, or the Selective Service regulations.[30]

The System would have no objection to making pre-induction suits available to all registrants, if Congress had so provided and if it were possible for a court to determine, promptly on the filing of an action, whether a registrant's rights under the Constitution or the Selective Service Act or regulations have been violated. But the practicality of the situation is that it is not possible for a court to determine promptly whether the registrant's rights have in fact been violated. Pre-induction suits are generally filed within a few days of the induction date. All involve allegations that constitutional, statutory, or regulatory violations of the registrant's rights have occurred. Many such

[30] Even if the exception to Section 10(b)(3) were confined to registrants claiming express statutory exemptions, the System believes that a large number of registrants would bring pre-induction suits. Thus, a question would arise with respect to conscientious objectors (50 U.S.C. App. 456(j)). Similarly, college students are entitled by statute to a deferment (50 U.S.C. App. 456(h)), and, while the granting of the deferment is subject to administrative rules and regulations, the registrant's entitlement to a continuation of a deferment until he graduates (or reaches age 24), is unconditional.

suits involve either questions of law that are unclear, or questions of fact that are complex. In these circumstances, a district judge would be virtually compelled to grant interim relief if he has jurisdiction, for otherwise the case would become moot on the registrant's induction. Thus, the induction process would be subject to the "litigious interruptions" which Congress determined should not be allowed.[31]

In light of the express congressional purpose in enacting Section 10(b)(3), it is the System's view that there is no room for an exception in cases where it is alleged that the board has clearly exceeded its statutory or constitutional authority;[32] such allegations frequently involve questions that take much time to litigate.

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[31] The prospect for such "litigious interruptions" is magnified when it is realized that many young men are quite understandably anxious at least to delay their induction. Anyone who seeks delay, and who knows that the filing of an action will in all likelihood lead to a deferral of his induction through the grant of interim relief, may be expected to bring a pre-induction suit, even though he does not expect to prevail on the merits. Accordingly, such "litigious interruptions" of the induction process can be expected on a large scale. And while those who are willing to use the judicial process for purposes of delay would obtain postponements of induction, other young men who do not have access to lawyers, or are less well-informed regarding the possibilities of judicial delay, or do not wish to utilize such delaying tactics, will be inducted in their place.

[32] Moreover, Section 10(b)(3) itself was passed in response to the Second Circuit's decision in *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817—a case in which the court of appeals concluded that the local board had acted clearly beyond its statutory authority (see H. Rep. No. 267, 90th Cong., 1st Sess. 30–31). Congress thus intended to preclude pre-induction judicial review in cases where authority was

The Selective Service System is not unconcerned with the heavy burden placed on registrants whose rights have been violated if they are required to complete the induction process before they can vindicate these rights in court.[33] But it is also concerned with the delays in the induction process that will take place if courts have jurisdiction to stay induction orders pending determination of whether a registrant's rights have been violated. Section 10(b)(3) represents a congressional judgment that the burden should be imposed on those few registrants whose rights are in fact violated by their induction orders, in order to avoid the "litigious interruptions" to the induction process that would be occasioned by pre-induction review in the much greater number of cases in which

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exceeded or usurped by local boards, not simply misapplied or abused. Indeed, alleged usurpation of delegated authority is the only ground on which draft board action may be reviewed in criminal prosecutions or habeas corpus actions (*Estep* v. *United States*, 327 U.S. 114, 119–123).

[33] As a practical matter, the burden placed on the registrant is heaviest when his rights are *not* clear, since in such a case he is taking the greatest risk by completing the induction process. Where, on the other hand, the registrant's rights have plainly been violated, he runs very little risk by refusing to submit to induction and awaiting prosecution, or by submitting to induction and immediately bringing a habeas corpus action. Thus, for example, petitioner here runs very little risk, even though he cannot obtain pre-induction judicial review, if it is in fact clear that his right to a statutory exemption was violated. In such event, the Department of Justice would not prosecute if he refuses to be inducted, and would promptly confess error if he submits to induction and brings a habeas corpus action. Thus, the suggested exception to Section 10(b)(3), if it is in practice confined only to those registrants whose rights have been "clearly" violated, will aid only those registrants whose risk in completing the induction process is minimal, and will not serve to assist those who run a substantial risk in so doing.

no rights have been violated but in which registrants nevertheless bring suit. The congressional judgment in this respect is applicable to the instant situation, is, in the view of the Selective Service System, consistent with the Constitution, and must be followed by the courts.

The Selective Service System also contends that the delinquency regulations can be applied to a registrant even though he is otherwise entitled to a statutory exemption. The present delinquency regulations have been in effect since 1948, and similar regulations were in effect during World War II. Congress has been aware of these regulations, and in Section 6(h) of the 1967 amendments (50 U.S.C. App. 456(h), as amended), expressly recognized and authorized the key element of the delinquency procedure—*i.e.*, the priority induction status of delinquents. Thus, the System contends that the delinquency regulations are not merely administrative and can affect statutory rights. These regulations are a recognized and long established feature of the Selective Service System. Accordingly, when Congress conferred exemptions and deferments in the Selective Service Act, it did so, the System feels, in the context of these regulations.

Moreover, the System believes that a reading that the statutory exemptions and deferments are subject to the delinquency regulations is in accord with the purposes of the Act. Section 6(g), while granting ministerial students exemption from military service, states explicitly that such students are *not* exempt from registration. As registrants, they owe a number of

duties to their local boards, including the duty of carrying their registration certificates and keeping their local boards informed of their current status—the grounds of petitioner's delinquency here. The delinquency regulations are designed to insure that registrants comply with the duties they owe to the Selective Service System and to provide a means of compelling registrants to maintain contact with their local boards.[34] The Selective Service System has a large interest in maintaining contact with petitioner. He is of a draft-eligible age, and his status as a ministerial student could end at any time should he leave school for one reason or another before completing his studies.

In short, it is the position of the Selective Service System that the delinquency regulations constitute the method that has been devised, with the approval of Congress, for enforcing the maintenance of contact between registrants and the System. Both the purpose and the terms of these regulations apply to petitioner. Thus, the System contends that the petitioner's entitlement to a ministerial exemption is conditioned on compliance with his duties as a registrant—duties it is the function of the delinquency regulations to enforce.[35]

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[34] The Selective Service System notes that here the professed purpose of petitioner's actions was to "disassociate [him]self from the [Selective Service] system" (A. 11).

[35] *Pickens* v. *Cox*, 282 F. 2d 784 (C.A. 10), held that the statutory exemption for a sole surviving son may be waived or abandoned by failure to claim it at an appropriate time. Similarly, here, in the System's view, the statutory exemption for ministerial students may be waived or abandoned by the student's failure to comply with his duties as a registrant.

Finally, the System points out, that this Court, in *Eagles* v. *United States ex rel. Samuels,* 329 U.S. 304, and *Eagles* v. *United States ex rel. Horowitz,* 329 U.S. 317, determined that the exemption of a theological student is not absolute, and that he may be removed from such status when other evidence in his file requires such action. It also contends that the procedure it now supports was approved by the Attorney General in his formal statement,[36] made jointly with the Director of Selective Service in December 1967, in which he said:

> It has long been the law that a registrant who violates any duty affecting his own status (for example, giving false information, failing to appear for examination, or failing to have a draft card) may be declared a "deliquent" registrant by his local draft board. Under consistent practice, information received by federal law enforcement officials regarding a registrant's own status is turned over to his local draft board for appropriate action. When a person is declared to be a delinquent registrant by his local board, he may be reclassified and becomes subject to the highest priority for induction if otherwise qualified. If he fails to step forward for induction, he is subject to prosecution by the Department of Justice. This procedure is firmly established, approved by the courts, and has been followed since the en-

[36] The full text of this joint statement is included in Appendix B (*infra*, pp. 79–80).

There is also included in Appendix C (*infra*, pp. 81–82) the relevant proceedings in *National Student Association* v. *Hershey*, Civil Action, 3078–67, D.D.C.

actment of the 1948 Selective Service Act, as well as under earlier Selective Service Acts.

The Attorney General thus made it clear that such violations should be handled administratively by the Selective Service System, rather than by prosecution for the particular offense.

CONCLUSION

For the reasons stated, the judgment below should be reversed and the cause remanded with directions to hold a hearing on the merits of the complaint, including the question of the jurisdictional amount required by 28 U.S.C. 1331, and, if the alleged facts are proved, to enter a decree in favor of petitioner on the basis of his status as a statutorily exempt ministerial student.

Respectfully submitted.

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SEPTEMBER 1968.

APPENDIX A

Pertinent passages from District Judge Dooling's opinion in *United States* v. *Eisdorfer*, No. 67 Cr. 302, decided June 24, 1968 (E.D.N.Y.) relating to the validity of delinquency reclassification (see *supra*, p. 55) read as follows:

> That the validity of the delinquency regulations * * * raise[s] a grave issue is evident. It is not that military service or induction into it can be regarded as punitive. The legally cognizable interest involved is the interest in being inducted only in the statutory circumstances, after a proper review by the local board of any relevant claims to deferment or exemption (all of which exist in the public interest and not primarily as individual privileges), and in the order of induction established by regulations which are lawful under the statute. The delinquency regulations empower the local board to declare a registrant delinquent for failure to perform any duty required of him under the Act (other than reporting for induction or civilian work). * * * The registrant's duties embrace not only the primary ones of registration, submission to specific directions to report (as for examination), and submission to induction, but also secondary duties that in some instances do no more than facilitate administration of the system and in others are more evidently in some form indispensable to effective administration of the law. Some of the duties are expressed in such terms that literal interpretation of them is impossible, and they invite judgmatical approxima-

tions of compliance that could easily be wrong. * * * Although the imposed duties range widely in importance and in the inherent probability that non-compliance will be willful or will be damaging to the just administration of the selective service system, if there is any failure to perform any duty, "the local board may declare [the registrant] to be a delinquent" whether the failure is the result of innocent inadvertence, reasonable misinterpretation, negligence, willful disobedience rooted in principle or malign evasion. * * * There are no degrees of delinquency. No standards prescribe the particular occasions when the power is to be exerted, or what findings of gravity, of willfulness, of penitence, of reparation are relevant to deciding whether or not to declare the registrant delinquent. It does not help that the regulations may not be insupportably vague in describing the duties imposed. The fault is in the absence of any standard or guide to the evalution of the importance of the omitted duty and the guilt-character of the omission to perform it.

If the declaration of delinquency were only a first stage to be followed by an ordered and sortable set of governmental responses, the arbitrariness of the regulations would be relieved; but the regulations contemplate only one kind of delinquency with one consequence for all cases in which the status is acted upon, and there is no alternative except complete remission, again by local board action taken at unbounded discretion. A registrant declared delinquent "may be removed from that status by the local board at any time." * * * No standards for removal from delinquency status are furnished. No right to be removed from the status is granted, no standards of appeal are stated. If the delinquent status is not terminated, then the local board "may" classify the registrant Class 1–A (or 1–A–O) "regardless

of other circumstances" than the delinquency. * * * No standards govern the decision. If the 1–A classification is made, and it may be extended to one who, but for a minor delinquency, would be triply deferrable for family hardship, and occupational reasons, then the "local board shall order [the] delinquent . . . to report for induction in the manner provided in Section 1631.7 * * *."

Nowhere, then, in the delinquency regulations are any standards of application or remission stated. They enunciate no delinquency policy, and invoke no part of the statute that can be argued to enunciate a Congressional policy that the delinquency regulations can be said to implement. The delinquency procedure has no statutory authorization and no Congressional support except what can be spelled out of the 1967 amendment of 50 U.S.C. App. § 456(h)(1), which recognizes the prime classes for call-up as being "delinquents and volunteers." The delinquency regulations, moreover, disregard the structure of the Act; deferments and priorities-of-induction, adopted in the public interest, are treated as if they were forfeitable personal privileges.

It would appear that unless it can be shown that settled administration and published instructions having the effect of rules or regulations have essentially turned the delinquency regulations into standardized compliance-securing procedures that are compatible with the Act and the valid substantive regulations adopted under it, they cannot be regarded as a legally sufficient authorization for reclassification or priority-of-induction that would not otherwise be authorized by the Act and valid substantive regulations adopted under it. *Cf. Panama Refining Co.* v. *Ryan,* 1935, 293 U.S. 388, 428 *et seq.; Zemel* v. *Rusk,* 1965, 381 U.S. 1, 17–18.

APPENDIX B

JOINT STATEMENT OF ATTORNEY GENERAL RAMSEY CLARK AND DIRECTOR OF SELECTIVE SERVICE LEWIS B. HERSHEY

The Department of Justice has established a special unit in the Criminal Division to coordinate prompt prosecution of offenses against the Selective Service laws and related statutes. The responsibilities of this unit include prosecution of violations of provisions of the Selective Service law making it unlawful knowingly to counsel, aid, or abet others to refuse to register or serve, or knowingly to interfere by force or violence or otherwise with the administration of the System. This unit also has responsibility for prosecution of violations of the related statutes outlawing interference with the Armed Forces or obstruction of recruiting and enlistments. The special prosecution unit is under the direction of John Van de Kamp, formerly U.S. Attorney for the Central District of California and now Deputy Director of the Executive Office for U.S. Attorneys.

All U.S. Attorneys have been instructed to speed up investigation and prosecutorial recommendations on these cases. They have also been directed to cooperate with local law enforcement officials and to urge them to vigorously prosecute violations of local laws which may occur in demonstrations against the Selective Service System.

It has long been the law that a registrant who violates any duty affecting his own status (for example,

giving false information, failing to appear for examination, or failing to have a draft card) may be declared a "delinquent" registrant by his local draft board. Under consistent practice, information received by federal law enforcement officials regarding a registrant's own status is turned over to his local draft board for appropriate action. When a person is declared to be a delinquent registrant by his local board, he may be reclassified and become subject to the highest priority for induction if otherwise qualified. If he fails to step forward for induction, he is subject to prosecution by the Department of Justice. This procedure is firmly established, approved by the courts, and has been followed since the enactment of the 1948 Selective Service Act, as well as under earlier Selective Service Acts.

Lawful protest activities, whether directed to the draft or other national issues, do not subject registrants to acceleration or any other special administrative action by the Selective Service System. Activities which violate federal law will be dealt with under the procedures outlined above depending upon the nature of the conduct. The lawful exercise of rights of free expression and peaceful assembly have incurred and will incur no penalty or other adverse action. These rights are guaranteed by the Constitution. They are vital to the preservation of free institutions, which our men in Vietnam are fighting to protect.

No single statement can cover the myriad different factual situations presented by the conduct of individual registrants. In approaching these situations, we will continue to work to preserve the integrity and effective operation of the Selective Service System while fully protecting the constitutional rights of the registrants.

APPENDIX C

United States District Court for the District of Columbia

Civil Action 3078–67

NATIONAL STUDENT ASSOCIATION, ET AL., PLAINTIFF

v.

LEWIS B. HERSHEY, DEFENDANT

(Washington, D.C., Thursday, March 7, 1968)

* * * * *

PROCEEDINGS

The COURT. All right.

There is pending a plaintiff's motion for preliminary injunction which becomes moot by reason of both sides having moved for summary judgment. Therefore, the motion for preliminary injunction will be denied.

It is the opinion of the Court that the letter of General Hershey had no legal effect whatever, and that, therefore, the Court has no jurisdiction to enjoin or otherwise affect his issuance of this letter which, as far as the Court can see, merely expressed his personal opinion.

Further, were it otherwise, the Act of Congress in the recent amendment in 1967, I believe, would de-

prive this Court of jurisdiction to consider the matter.

And further, there is an adequate remedy for anyone whose rights are abused in the event they are reclassified by exercising a constitutional right administratively and through the Federal Courts to protect that interest.

The Court will, therefore, deny the plaintiff's motion for summary judgment, and will grant the Government's motion for summary judgment, and will grant the Government's motion to dismiss.

U.S. GOVERNMENT PRINTING OFFICE: 1968